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No. 483

In the Supreme Court of the United States

OCTOBER TERM, 1958

DR. HENRY M. LADREY, PETITIONER

v.

COMMISSION ON LICENSURE TO PRACTICE THE HEALING ART IN THE DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The oral opinion of the district court appears at pages 55–56 of the Record. The opinion of the Court of Appeals (R. 59–71) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 31, 1958, and the petition for a writ of certiorari was filed on October 29, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. (a) Whether petitioner has waived his right to challenge the constitutionality of the provision of the Healing Arts Practice Act of the District of Columbia under which his license to practice medicine and surgery was revoked by failing to raise the question in the district court.

(b) Whether the provision of the Healing Arts Practice Act of the District of Columbia authorizing the district court, sitting as a court of equity, to revoke a physician's license when it finds he "has been guilty of misconduct or is professionally incapacitated," is so vague as to be unconstitutional.

2. Whether testimony by a police officer as to the contents of a telephone conversation which he overheard by listening on an extension phone to a call by one in police custody is inadmissible against the receiver of the call because obtained in violation of Section 605 of the Federal Communications Act.

STATUTES INVOLVED

Section 605 of the Federal Communications Act, 47 U. S. C. 605, provides in pertinent part:

> * * * [A]nd no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *.

Title 2, District of Columbia Code (1951 ed.), Section 123, provides:

> The District Court of the United States for the District of Columbia, sitting as a court of

equity, may suspend or revoke any license issued and any registration effected under this chapter, upon evidence showing to the satisfaction of the court that the licentiate or registrant, as the case may be, has been guilty of misconduct or is professionally incapacitated.

Proceedings looking toward the suspension or revocation of a license or registration shall be begun by petition filed in the District Court of the United States for the District of Columbia in the name of the Commission on Licensure to Practice the Healing Art, or of the Commissioners of the District of Columbia, or of the [chief] of police of said District, and shall be verified by oath. Proceedings shall be conducted according to the ordinary rules of equity practice and such supplementary rules as said court may deem expedient to carry into effect the purpose and intent of this chapter; and said court is hereby authorized to make such supplementary rules. An appeal may be taken from the decision of the District Court of the United States for the District of Columbia to the United States Court of Appeals for the said District. Any such appeal on behalf of the Commission or of the Commissioners of the District of Columbia or of the [chief] of police of said District may be filed without bond. The District Court of the United States for the District of Columbia may determine whether a license or registration shall be suspended or be revoked, and if such license is to be suspended said court may determine the duration of such suspension and the conditions under which such suspension shall terminate.

Title 2, District of Columbia Code (1951 ed.), Section 131, provides:

> If a person licensed or registered under the provisions of this chapter be convicted in the District Court of the United States for the District of Columbia of any felony, the court, without further hearing or procedure, may suspend for such time and under such conditions as it deems proper, or may revoke, the license or registration of the defendant, in addition to imposing any other penalty provided by law. An appeal by the defendant in any such case from the conviction of the offense shall act as a supersedeas to the judgment of the court suspending or revoking his license or registration.

STATEMENT

Respondent, the Commission on Licensure to Practice the Healing Art in the District of Columbia, brought this equity action to revoke the license of petitioner to practice medicine and surgery in the District of Columbia (R. 1). Section 2–123 of the District of Columbia Code (*supra*, pp. 2–3) provides for such revocation by the District Court for the District of Columbia, sitting as a court of equity, upon a finding that the licentiate "has been guilty of misconduct or is professionally incapacitated." The complaint charged, and the district judge found, that petitioner had been guilty of "misconduct" in that, while a duly licensed and registered doctor and surgeon, he had on or about November 23, 1954, prescribed or administered a drug or had used an instrument on the person

of a pregnant woman with the intent of procuring a miscarriage, as a result of which the woman had a miscarriage and died three days later (R. 2).[1]

Petitioner appealed to the Court of Appeals, alleging (1) that this finding was clearly erroneous and rested upon insufficient evidence, (2) that the statutory term "misconduct" was too vague and indefinite to meet the requirements of due process, (3) that revocation of a doctor's license for performing an illegal abortion may be had only under D. C. Code, § 2–131, after conviction for a crime[2] and, (4) that the court improperly admitted, because obtained in violation of Section 605 of the Federal Communications Act, testimony of a police officer as to two conversations which he monitored on a telephone extension while a material witness spoke with petitioner. The Court of Appeals, sitting *en banc*, rejected all of these contentions and affirmed the judgment against petitioner (R. 59–68). A dissenting opinion was filed, to which three judges subscribed (R. 68–71).

ARGUMENT

Petitioner here relies upon two of the four arguments he raised in the Court of Appeals in urging that his license to practice medicine was improperly revoked: (1) that the statute providing for revocation

[1] The trial judge made no findings as to two other charges in the complaint: (1) that petitioner visited the deceased, but denied that he had done so: and (2) that petitioner failed to notify the police or the coroner of her death (R. 2).

[2] This statute (*supra*, p. 3) provides that, upon conviction for any felony in the district court, a physician's license may be revoked without any further hearing or procedure.

was so vague as to be unconstitutional and (2) that certain evidence introduced against him in the revocation proceeding was inadmissible because obtained in violation of Section 605 of the Federal Communications Act. We believe that petitioner's failure to raise the constitutional question in the district court precludes him from pressing that issue in this Court and that, in any event, the contention is without merit. Petitioner's second contention is, we submit, also without merit. Thus, there is no occasion for further review by this Court of either question raised by petitioner.

1. (a) Petitioner argues that Section 2–123 of the D. C. Code, *supra*, pp. 2–3, is unconstitutional because, in providing for revocation of his physician's license for "misconduct" or professional incapacity, the statutory language is so vague and indefinite as to violate the requirements of due process. But petitioner's failure in the trial court to raise any question of the constitutionality of the statute forecloses him from raising this issue, either in the appellate court, as the Court of Appeals held (R. 65), or in this Court. *Shelley* v. *Kraemer*, 334 U. S. 1, 8; *Yakus* v. *United States*, 321 U. S. 414, 444; *Duignan* v. *United States*, 274 U. S. 195, 200; *Wong Tai* v. *United States*, 273 U. S. 77, 78; cf. *Ullmann* v. *United States*, 350 U. S. 422, 439, n. 15; and see generally, *United States* v. *Petrillo*, 332 U. S. 1, 10.

(b) Moreover, even if this question is properly raised, it plainly is without merit. "Misconduct" has a clear and well-defined meaning in reference to professional activity; and since revocation of a physician's license on this ground in the District of Columbia can result only after a formal action in equity in the district court, with all of the safeguards of the Federal Rules, and the right to seek appellate review of an adverse decision, there can be no doubt as to the reason for revocation nor is there danger of an abuse of the statutory criterion. Thus, in the circumstances of this case, petitioner can hardly contend that an express finding that he performed an illegal abortion, as a result of which the patient died, is not such professional "misconduct" as to warrant revocation of his license to practice medicine; he was fully advised of the details of this charge and had ample opportunity to refute or explain it. Hence, petitioner has no basis for a complaint that he was denied due process of law.

"Misconduct" is, of course, a universal basis for professional disqualification. Whether dealing with doctors, dentists, lawyers, teachers, or engineers, statutes or rules regulating these professions almost invariably provide that the privilege to practice the profession may be withdrawn for "misconduct"; and in each case of misconduct the term is given content by references to the standards of the particular profes-

sion.[3] As the New York Court of Appeals pointed out in sustaining the revocation of a dentist's license for "unprofessional conduct," the standards of conduct in any profession are "part of the ethics of the profession and 'what is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards.'" *Cherry* v. *Board of Regents*, 289 N. Y. 148, 158, 44 N. E. 2d 405, 412. The court continued (*ibid.*): "Every member of the profession should be regarded as an expert for such purpose. There is a moral dereliction in failure by any member of a profession to apply in professional practice the standards which, by consensus of opinion in the profession, are necessary."[4]

The necessity for such a flexible criterion is obvious; any attempt, as in a criminal statute, to spell out the specific activities which result in professional disquali-

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[3] A large number of cases defining and applying this criterion of "misconduct" with reference to the various professions are collected in 27 Words & Phrases 309–316, and particularly in the 1958 pocket part volume, pp. 80–89. In accordance with this general practice, both this Court and the Court of Appeals below provide in identical language for disbarment of attorneys "guilty of conduct unbecoming a member of the bar of this court." Rule 8, Rules of the Supreme Court of the United States; Rule 7 (e) (2), General Rules of the United States Court of Appeals for the District of Columbia Circuit.

[4] See also *Bell* v. *Board of Regents*, 295 N. Y. 101, 65 N. E. 2d 184; *In re Smith*, 10 Wend. (N. Y.) 449; *Duke* v. *Committee on Grievances*, 82 F. 2d 890 (C. A. D. C.); *Hatfield* v. *New Mexico State Board of Registration*, 60 N. M. 242, 290 P. 2d 1077; cf. *Ex parte Secombe*, 19 How. 9, 14; *Ex parte Wall*, 107 U. S. 265.

fication would simply weave a loose-meshed net through which many miscreants could escape. Indeed, the District of Columbia Code does specify, as grounds for automatic revocation of a license, the conviction of a felony. D. C. Code Sec. 2–131, *supra*, p. 3. By further providing in Section 123 for revocation upon a finding of misconduct, however, the statute properly goes beyond the scope of the criminal law and imposes upon the practitioners of the healing arts the duty to conform to the ethics of their own professions. The standards prescribed by Congress in a statute such as this must, of course, "be read in the light of the conditions to which they are to be applied. 'They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear.' *American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90, 104." *Lichter* v. *United States*, 334 U. S. 742, 785. In the present case, both the persons to whom the statute applies, practitioners of the healing arts, and those charged with the duty of enforcing this standard of conduct, the members of the Committee on Licensure to Practice the Healing Art, are fully aware of the meaning and content of the statutory criterion. In the words of the court below (R. 64–65): "The purpose of the statute here is clear and calls for no further exploration into semantics. Congress intended to provide a remedial measure for the protection of the public, and misconduct certainly included, and must have been known by a medical

practitioner to have included, the performance of an illegal abortion."[5]

Nor is the determination of whether a physician is guilty of "misconduct" left to the discretion of a hearing board uncontrolled by fully adequate rules of procedure. To the contrary, only the District Court for the District of Columbia, in a formal equity proceeding, can make such a finding, after the defendant has had full opportunity to utilize the provisions of the Federal Rules of Civil Procedure, both in framing his pleadings and in preparing for trial. As the Court

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[5] The only case which petitioner cites as support for his contention that "misconduct" is too indefinite a term to regulate professional licensure is a 1904 decision of the Court of Appeals for the District of Columbia. *Czarra* v. *Board of Medical Supervisors*, 25 App. D. C. 443. That case held that the provision in the predecessor statute to the present Healing Arts Practice Act permitting an administrative board of medical supervisors to revoke a physician's license for "unprofessional or dishonorable conduct" was void for uncertainty. Whatever the state of the medical profession in 1905, however, it plainly is guided today by a definite and ascertainable code of ethics, upon which the public is entitled to rely, and which each member of the profession is presumed to know. See *e. g.*, *Principles of Medical Ethics of the American Medical Association*, A. M. A. Directory (20th Ed., 1958), p. 25; Sperry, *Ethical Basis of Medical Practice* (1950); Healey, *Medical Ethics* (1956). Moreover, as we point out, *infra*, pp. 10–11, unlike the situation which obtained when *Czarra* was decided, the power to revoke a physician's license today rests, not in an administrative board, with "insufficient safeguards" for the practitioner (opinion of Court of Appeals, R. 63, fn. 13), but in a court of equity, with full procedural and appellate protection. Finally, of course, even if the result below is considered inconsistent with the *Czarra* case, a refusal by the Court of Appeals to follow its own reasoning in a fifty-year-old case involving a different statute and different circumstances clearly supplies no basis for invoking this Court's jurisdiction.

of Appeals found (R. 64), "'[m]isconduct', as a ground for suspension or revocation is not left as a matter of opinion but is susceptible to complete exposition under the Rules and requires proof as a matter of fact accordingly." And, finally, the statute provides for review by the Court of Appeals of a finding of misconduct. Accordingly, a defendant is fully protected, both against any confusion or uncertainty as to the charge against him, and against abuse of the statutory criterion.

2. Petitioner also contends that testimony by a police officer as to the content of telephone conversations between petitioner and the witness George Matthews was inadmissible because obtained in violation of Section 605 of the Federal Communications Act, *supra*, p. 2. Matthews, the paramour (R. 13) of the woman on whom the abortion was performed, had given the police a statement concerning the circumstances of her death. While at police headquarters, Matthews made two telephone calls to the petitioner at his office and, with Matthews' knowledge, the conversations were monitored by police officers through an extension telephone (R. 39.)[6] Defense counsel ob-

[6] The Court of Appeals summarized the telephone conversations as follows (R. 66–67):

> * * Matthews told the appellant he had been questioned throughout the entire day by the police and that he was scared.
>
> "Dr. Ladrey told Matthews to come to his office," the officer testified, and then appellant hung up the telephone.
>
> "Matthews made a second telephone call in the same manner," and (we omit some detail) "Dr. Ladrey told Matthews to catch a taxicab and come directly to his office

jected to the admission of testimony as to these conversations and the following took place (R. 39–40):

Mr. WRIGHT [Defense counsel]. I don't think it would be legal evidence, if it is a question of wire tap evidence.

The COURT. That is not wire tapping.

By the COURT:

Q. You say you monitored the conversation through an extension. This conversation was between whom?—A. Between George Matthews and Dr. Ladrey, Your Honor.

Q. And where were the two parties located at the time of the conversation?—A. Dr. Ladrey was in his office and George Matthews was in the Homicide Squad.

Q. Did George Matthews or Dr. Ladrey, or either of them, know that the conversation was being monitored?—A. George Matthews did; yes, sir.

The COURT. The objection is overruled.

I had occasion to pass on this point in the case of United States against Sullivan, and the wire tapping does not apply to a situation where one of the parties acquiesced in the conversation being intercepted.

Mr. WRIGHT. Well, Your Honor, wouldn't this situation be different in that at the time the alleged conversation was had the witness Matthews was in the custody of the police?

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on N Street." After further conversation, "Dr. Ladrey asked Matthews if he was sure he wasn't being followed by the police. He stated he was sure he wasn't being followed by the police."

When appellant was interviewed by the officer, "He admitted most of the conversation," but denied asking "Are you sure you are not being followed by the police"[?]

The COURT. That would not make any difference.

Mr. WRIGHT. And therefore under their control.

The COURT. That would not make any difference.

Proceed.

The evidence of the telephone conversations was, we submit, properly admitted. Cf. *Rathbun* v. *United States*, 355 U. S. 107. The *Rathbun* decision held that a communication which the *petitioner* in that case initiated and which was overheard by police officers at the request of the receiver of the call upon the latter's regularly used telephone extension did not constitute an interception within the meaning of statute. The Court stated (355 U. S. at 111):

> Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain. Consequently, one element of Section 605, *interception*, has not occurred.

In the present case, of course, the originator of the calls was the witness, not the petitioner, and the policemen listened to the calls on their own extension telephone. Also, proof that Matthews voluntarily consented to use of the extension by the police is absent here and the fact that consent was present was repeatedly adverted to by this Court in *Rathbun*. In these respects, this case differs from *Rathbun*.

The interception which is proscribed by Section 605, however, is an interference with the system of communication by interception in the process of transmission and not in listening on a regularly installed telephone instrument to a message which is being transmitted, without mechanical interception to the place to which it was directed. See *Goldman* v. *United States*, 316 U. S. 129, 133, 134; *Rayson* v. *United States*, 238 F. 2d 160 (C. A. 9); *United States* v. *Bookie*, 229 F. 2d 130 (C. A. 7); *United States* v. *Lewis*, 87 F. Supp. 970 (D. D. C.), reversed on other grounds, 184 F. 2d 394 (C. A. D. C.); *United States* v. *Pierce*, 124 F. Supp. 264 (N. D. Ohio), affirmed *per curiam*, *Pierce* v. *United States*, 224 F. 2d 281 (C. A. 6). Thus, the fact that Matthews made these calls from police headquarters where he was being questioned by police officers does not make the act of those officers an "interception." Nor is the presence or absence of consent relevant to whether use of an extension telephone constitutes an interception.

As this Court said in *Rathbun*, "[c]ommon experience tells us that a call to a particular telephone number may cause the bell to ring in more than one ordinarily used instrument." 355 U. S. at 111. Use of such an extension, with or without the consent of the other party to the call, is a hazard which those who speak over the telephone must face. What is crucial is, not the state of mind of the speaker or listener, but the mechanical means by which the call is overheard. It has been held, therefore, that even where one of the parties to the call is under arrest, and is ordered by the police to conduct a telephone

conversation while a police officer listens, there is no "interception" of the message of which the other party to the call can complain. *United States* v. *Bookie*, 229 F. 2d 130, 131 (C. A. 7); *Flanders* v. *United States*, 222 F. 2d 163 (C. A. 6); *Pierce* v. *United States*, 224 F. 2d 281 (C. A. 6), affirming 124 F. Supp. 264 (N. D. Ohio); cf. *United States* v. *White*, 228 F. 2d 832 (C. A. 7); *United States* v. *Sullivan*, 116 F. Supp. 480 (D. D. C.), affirmed, 95 App. D. C. 78, 219 F. 2d 760; *United States* v. *Guller*, 101 F. Supp. 176 (E. D. Pa.); *United States* v. *Lewis*, 87 F. Supp. 970 (D. D. C.), reversed on other grounds, 87 App. D. C. 274, 184 F. 2d 394; *United States* v. *Yee Ping Jong*, 26 F. Supp. 69 (W. D. Pa.).

Under the facts of this case, therefore, no violation of Section 605 occurred and testimony relating to the telephone calls was properly admitted in evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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